Kenco Plastics Company, Inc. *and* United Paperworkers International Union, AFL-CIO. Case 30-CA-5684

March 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 5, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. The Union initiated an organizing campaign among the production and manufacturing employees at Respondent's facility in November 1979. Prior to the Union's organizing campaign, Respondent's general manager, Frank Raufeisen, visited the production area of the plant once or twice a day. Employee witnesses credibly testified, however, that Raufeisen increased both the frequency and the duration of these visits after the Union filed a representation election petition with the Board on December 26, 1979. During these visit, Raufeisen closely scrutinized the activities of production employees, including employee Richard Pitts, whom Raufeisen admittedly suspected was one of the Union's chief adherents.

The Administrative Law Judge found that Raufeisen intensified his observation of employees because the petition had been filed and because the employees had been engaging in union activity. Despite this finding, he concluded that Respondent had not violated the Act in the absence of a contention that Raufeisen's conduct made working conditions more onerous. We disagree.

In view of the unprecedented nature of Raufeisen's visits to the production area, the absence of any legitimate explanation for these visits, and the suspicious timing of their occurrence after the filing of the election petition, we find that these visits had the purpose and effect of harassing and intimidating employees because of their union activities. Such conduct interferes with employees' rights under Section 7 of the Act even if no more onerous working conditions are imposed. Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by intensifying its observation of employee activities in response to union activities.[1]

2. On January 21, 1980,[2] Raufeisen issued a written warning to Richard Pitts for loitering. The letter stated: "Time and again I have observed you loitering around the plant. Be advised, this will not be tolerated. This is warning number one." The complaint alleges that Respondent's issuance of the warning letter is a violation of Section 8(a)(3) and (1). The Administrative Law Judge recommended dismissal of the allegation based on his conclusion that there was no showing of animus and that the General Counsel failed to prove that Pitts was not loitering. Again, we disagree.

Prior to the Union's organizing campaign, Pitts had received only compliments about his work, no complaints or warnings. When the campaign began, Pitts passed out authorization cards to numerous employees, spoke openly about his support for the Union, and became one of the Union's leading adherents. Respondent was indisputably aware of Pitts' union activities.

In finding a prohibited motive for a disciplinary action, independent evidence of animus is relevant but is not an essential element of proof.[3] It is clear, however, that Respondent did indeed harbor animus against the Union. Respondent expressed this animus lawfully by making speeches at the plant and by sending employees letters which indicated strong opposition to the Union. In addition, Pitts testified without contradiction that Supervisor Levine Wetley offered him a raise if Pitts would "talk to people and forget about the Union."[4] Finally, Respondent's animus was manifest when, as discussed above, Raufeisen unlawfully increased his observation of employees at work because they had engaged in union activity. Accordingly, Respondent's animus is a circumstantial factor warranting an inference of unlawful motivation for the warning to Pitts.

The suspicious timing of the warning letter further warrants an inference of unlawful motivation. The representation petition was filed on December 26, 1979, Raufeisen responded with unlawful harassment of employees at work, the representation hearing was conducted on January 16, and Respondent issued the unprecedented warning letter to Pitts on January 21. When asked why he issued the warning to Pitts when he did, Raufeisen testified that, while he was spending more time on the plant floor, he noticed that Pitts was spending

[1] See, e.g., *Florida Steel Corporation*, 215 NLRB 97, 98 (1974).

[2] All dates are in 1980 unless otherwise indicated.

[3] *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977).

[4] Wetley did not testify. The General Counsel does not allege that Wetley's conduct violated Sec. 8(a)(1).

more time away from his work station. Rather than eliminating suspicion about the timing of the warning, Raufeisen's statement suggests that the warning was the logical and desired consequence of his unlawful observation tactics.

Based on the foregoing, we conclude that the General Counsel established a *prima facie* case that Respondent issued the warning to Pitts because of his union activity. Respondent's knowledge of Pitts' union activity, its expression of union animus, the precipitous timing of the warning, and the contrast between the warning and Respondent's previous apparent satisfaction with Pitts' work constitute a *prima facie* showing of unlawful discriminatory motivation. We find that Respondent has failed either to rebut that showing or to demonstrate that it would have warned Pitts in the absence of his union activities. Although Raufeisen testified that he had noticed Pitts loitering on several prior occasions and that he had issued warnings for loitering to other employees in the past, this unsubstantiated testimony merely begs the question why Pitts had not been warned prior to January 21. In addition, Pitts testified without contradiction that, when he showed the written warning to Supervisor Wetley, Wetley stated that he was not aware of a loitering policy and that this was the first time he had ever heard of such a warning.

We conclude that Respondent has failed to establish its reliance on a legtimate reason for issuing a written warning to Pitts on January 21. We further conclude that the preponderance of all the evidence establishes that Respondent disciplined Pitts solely because of his protected union activities, thereby violating Section 8(a)(3) and (1) of the Act.

3. On February 1, the Regional Director for Region 30 directed a representation election to be held among employees at Respondent's plant on February 28. On February 11, Respondent terminated Pitts. Contrary to the Administrative Law Judge, we find that Respondent discharged Pitts for engaging in union activities and thus violated Section 8(a)(3) and (1).

On February 8, Pitts lost 20 cents in the coffee machine located in Respondent's lunchroom. Pitts affixed to the machine a note which stated: "THIS F— MACHINE OWES RICK 20¢." Subsequently, Raufeisen removed the note, photocopied it, and reposted the note with the notation "2/8/80 . . . FR has original . . . owes Rick 20¢." Later that same day, Pitts affixed another note to the machine, stating: "R.P. WILL GIVE YOU ANOTHER ONE IF YOU WANT THIS F— MACHINE OWES RICK 20¢." Pitts was the only plant employee named Rick.

On February 11, Raufeisen called Pitts into his office and told him he was terminated because of the obscenity used in the February 8 notes. During the ensuing conversation, Raufeisen threw a copy of one of the notes at Pitts, telling him to give it to the union representative.[5] On the same date, Raufeisen prepared a written report of the termination in which he noted the reason for discharge only as "use of profanity." At the hearing, however, Respondent presented a virtual laundry list of reasons for the discharge, asserting that Pitts was a poor quality employee, maintained a poor attendance record, engaged in perpetual loitering, threatened fellow workers, stole company property, and used excessive profanity. Notwithstanding these alleged deficiencies, Pitts had received only the January 21 warning letter, discussed in the preceding section, before his discharge. Raufeisen admitted that he has an established progressive disciplinary system which involves three warnings and two suspensions before termination.

The Administrative Law Judge considered the alleged reasons for Pitts' discharge and, with the exception of the use of profanity, found each to be without basis and clearly pretextual. He further found even the profanity defense to be "suspicious," but refused to discredit it and to draw an inference of unlawful discriminatory motivation in the perceived absence of circumstances corroborating such an inference.

Contrary to the Administrative Law Judge, we find that the General Counsel made a strong *prima facie* showing of Respondent's intent to discharge Pitts for his union activities. In addition to the evidentiary factors of knowledge, animus, timing, and related unfair labor practices discussed in preceding sections, we find proof of unlawful discriminatory motivation in Raufeisen's reference to a union representative during the discharge interview, Respondent's advancement of a multiplicity of inadequate *post hoc* reasons for the discharge,[6] and the gross disparity between Pitts' disciplinary treatment and Respondent's established progressive disciplinary system.

Respondent's reliance on Pitts' use of profanity in the February 8 notes cannot stand against the weight of evidence cited. Employee witnesses credibly testified that the allegedly offending obscenity was commonplace in conversation at Respondent's facility and had appeared in bathroom grafitti. Respondent still urges its concern that the obscen-

[5] While the Administrative Law Judge did not refer to Raufeisen's throwing the note and making reference to the union representative, Pitts' testimony about this conduct stands undenied by Raufeisen.

[6] See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).

ity not be seen in writing, but Raufeisen himself belied such a concern by posting an unexpurgated copy of Pitts' note.

Based on the foregoing, we find that Respondent seized upon the February 8 note incident as a pretext to rid itself of a principal union adherent during the critical preelection campaign period. Moreover, even assuming that Respondent legitimately relied on Pitts' use of obscenity in disciplining him, we find that it has failed to demonstrate that it would have discharged Pitts in the absence of his union activities.[7] In this regard, we note again Respondent's unexplained departure from a progressive disciplinary system when it terminated Pitts after only a single prior warning. Accordingly, we find that Respondent violated Section 8(a)(3) and (1) by discharging Pitts because of his union activities.

CONCLUSIONS OF LAW

1. Kenco Plastics Company, Inc., is an employer within the meaning of Section 2(2) of the Act, and is engaged in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By harassing employees with intensified surveillance of their work because they engage in union activities, Respondent violated Section 8(a)(1) of the Act.

3. By issuing a written warning to Richard Pitts on or about January 21, 1980, and by discharging him on or about February 11, 1980, in retaliation against his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. In particular, having found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Richard Pitts because he engaged in union activity, we shall order that Respondent offer him reinstatement to his former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights and privileges enjoyed by him. We shall additionally order that Respondent make Richard Pitts whole for any loss of earnings or other benefits he may have suffered as a result of his unlawful discharge. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[8] Finally, we shall order Respondent to expunge from its personnel files any reference to Pitts' unlawful warning and discharge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kenco Plastics Company, Inc., Necedah, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Harassing employees by intensifying surveillance of their work because they engage in union activities.

(b) Discriminatorily issuing warning letters to or discharging employees because they engage in union or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Richard Pitts immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any losses he may have suffered by reason of Respondent's discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the disciplinary warning issued to Richard Pitts on or about January 21, 1980, and to his subsequent discharge, and notify him in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future discipline against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[7] See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[8] Member Jenkins would award interest on the backpay due based on the formula set forth in his dissenting opinion in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

(d) Post at its Necedah, Wisconsin, place of business copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT harass our employees by intensifying our surveillance of their work because they engage in union or other protected concerted activities.

WE WILL NOT issue warning letters to or discharge employees because they engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Richard Pitts reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and to other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge, together with interest thereon.

WE WILL expunge from our files any references to the disciplinary warning issued to Richard Pitts on January 21, 1980, and to his subsequent discharge.

WE WILL notify Richard Pitts in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against him.

KENCO PLASTICS COMPANY, INC.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: A hearing on this matter was held before me on November 25, 1980, at Mauston, Wisconsin. The complaint is based upon charges filed on February 27, 1980,[1] against Kenco Plastics Company, Inc., herein called Respondent, by United Paperworkers International Union, AFL-CIO, herein called the Union. The complaint alleges one independent violation of Section 8(a)(1) of the Act and further alleges issuance of a warning notice to and discharge of employee Richard Pitts in violation of Section 8(a)(3) and (1) of the Act. Respondent filed an answer admitting jurisdictional facts but denying the commission of any unfair labor practices.

After the close of the hearing, Respondent filed a brief which has been carefully considered.

On the entire record and having taken into account the arguments made at the hearing and the brief submitted, I make the following findings and conclusions:

I. JURISDICTION

At all times material herein, Respondent has been a Wisconsin corporation with an office and place of business in Necedah, Wisconsin, where it is engaged in the manufacture of fiberglass products. During the calendar year ending December 31, Respondent in the course and conduct of said business operations sold and shipped from its Necedah, Wisconsin, facility products and materials valued in excess of $50,000 directly to purchasers located in points outside the State of Wisconsin. The complaint alleges, Respondent admits, and I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION'S LABOR ORGANIZATION STATUS

The complaint alleges, Respondent admits, and I find and conclude that at all times material herein the Union has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Findings*

Respondent manufactures, among other things, fiberglass tank covers for waste disposal plants. Its general

[1] All dates herein are between December 26, 1979, and February 11, 1980, unless otherwise specified.

manager is Frank Raufeisen and its supervisors are Levin Wetley and Frank Bezmek, all three of whom are supervisors within the meaning of Section 2(11) of the Act. Respondent employs about 30 production and maintenance employees and some office employees, including a draftsman, James Robinson.

On December 26 the Union filed a petition for a Board-conducted election seeking to represent the production and maintenance employees. On February 28 the Union won the election directed by the Regional Director and the Certification of Representative issued on March 7.

The chief employee organizer at the plant was John Sayllor, who first contacted the Union and secured union authorization cards to be distributed among the employees. Assisting Sayllor was alleged discriminatee Pitts. The extent of Pitts' activity is actually unknown. While he testified that he distributed employee authorization cards with Sayllor, there is no evidence that this was done in an open and obvious fashion which would charge Respondent with constructive knowledge of the activity. Employees Pitts, Sayllor, and Pangburn testified that Pitts was the most vocal of the union protagonists, but this testimony was so generalized and conclusionary that it is probative of nothing.

However, Raufeisen admitted that he had suspected that Pitts was one of the chief union adherents and Respondent does not defend this action on lack of knowledge of Pitts' union activities, whatever its extent.

The General Counsel relies on the letter-writing campaign conducted during the pendency of the petition by Respondent and certain conduct of Raufeisen as evidence of unlawful animus against the employees' union activity.

During the election campaign Respondent, by Raufeisen, sent four letters to all employees and prounion Supervisor Bezmek. In each of these Respondent strenuously expressed its opposition to the organizational attempt, repeating in each the theme: "You don't need a union." These remarks are not of themselves violative of Section 8(a)(1) of the Act,[2] and cannot be said to supply the evidence of animus necessary to support the General Counsel's case herein.

The conduct, in addition to sending the letters, upon which the General Counsel depends for a finding of unlawful animus is alleged in the complaint as a violation of Section 8(a)(1) thusly:

> 5. Since on or about January 1, 1980, Respondent visually harassed employees by closely scrutinizing their work.

Pitts and employees Sayllor and Stajduher credibly testified that, after the petition was filed, Raufeisen stood around watching them work more frequently, and for longer periods, than he had done theretofore. While this testimony is most generalized, it is essentially undisputed. Raufeisen testified that he needed to be in the plant more during the period of early 1979 to August 1980 because Respondent was having difficulty filling orders for tank covers. Although repeatedly asked by his counsel why such activity would have increased particularly during the months of January and February 1980, Raufeisen could give no cogent reason.

Therefore I find, as a proposition of fact, that, after the petition was filed on December 26, Raufeisen did increase the frequency and duration of his observation of the employees working and that he did so because the petition had been filed and the employees had been engaging in union activity.

However, there is no contention that this activity made the employees' work more onerous. Therefore, no violation of the Act can be found on that basis.

At the hearing I specifically asked counsel for the General Counsel if there was any case authority for the proposition that an employer's observation of employees while working could ever be violative of the Act. Counsel conceded that there was none. Moreover, since an employer has the right to watch employees to see if they are working efficiently or working at all, it seems impossible to fashion an enforceable order which would proscribe only watching employees because some or all of them had engaged in, or might engage in, protected union activity.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

The Discharge of Pitts

On February 8, Pitts attempted to purchase coffee from a vending machine in the plant lunchroom. The machine, according to Pitts, cheated him out of 20 cents. Pitts drew up and posted on the machine the following notice:

> This fuking
> machine owes
> Rick 20¢

When Raufeisen saw the note, he took it down, made a photocopy of it, and put the photocopy on the machine with the following notation: "2/8/80 . . . FR has original . . . owes Rick 20¢."

Later that day Pitts saw what Raufeisen had done and placed another notice up stating:

> R.P. WILL GIVE
> YOU ANOTHER ONE
> IF YOU WANT
> THIS FUCKIN
> MACHINE OWES
> RICK 20¢

When he reported to work on February 11, Pitts was instructed by Supervisor Wetley to report to Raufeisen's office. When asked on direct examination to recount what happened when he arrived in Raufeisen's office, Pitts testified:

> He told me I was fired and he told me—I asked him for what and he told me it was for obscenities, using obscenities and he had my check ready, paid up to 10:00 and this was about 8:30, quarter to 9, and I talked to him and I said—I asked him, you

[2] *Hospital Service Corporation d/b/a Blue Cross*, 219 NLRB 1 (1975).

know everything that happened. He had a piece of paper in his hand, a photostatic copy, and he threw it at me and said give it to Janssen and he threw it across the desk at me and I said I want to make one thing clear. Everything that happened in this, the reasons why I was fired, happened on my time, not Company time and he said he didn't care, it happened on Company property.

Raufeisen testified on direct examination that he told Pitts he was being discharged "for profanity and unacceptable general behavior." Raufeisen also filled out on that date an "Employee Warning Report" which listed as a "violation" the use of profanity. In a box on the report labeled "Company statement," Raufeisen wrote: "Confronted Mr. Pitts with attached matl. He confirmed it to be his. Terminated him for use of profanity."

I asked Raufeisen if he gave Pitts any reason other than profanity and unacceptable general behavior as being the reasons for the discharge. Raufeisen replied that he had not. Thereupon Raufeisen was questioned by his counsel and testified thusly:

Q. (By Mr. Curran) What were the specific reasons why you fired Mr. Pitts?

A. I fired Mr. Pitts because he—I judged him to be a very poor quality employee. His attendance record was atrocious. His perpetual loitering around the plant became intollerable. [sic] His threats to fellow co-workers, his stealing and excessive use of profanity.

Raufeisen was thereupon asked to explain what he meant by each of these reasons. In appraising these answers it is important to note that Raufeisen admitted that he has an established progressive disciplinary procedure which he uses "generally" and which involves three warnings and two suspensions before discharges take place. Except for the offense of loitering it is undisputed that Pitts received no warnings regarding any of his prior conduct.

In support of its contention that Pitts had poor attendance, Respondent introduced evidence which reflected that, during the third quarter of 1979, out of 13 weeks in which Pitts was scheduled to work a full 40-hour week, he worked only 7. In the fourth quarter he only worked 5. In the 7 weeks of the first quarter of 1980 that Pitts was employed by Respondent he put in a 40-hour week only twice. In regard to loitering, Raufeisen testified that it was a "common occurrence" for Pitts to loiter rather than work although he admitted that he could put no number of the times he had witnessed Pitts loitering. Raufeisen issued a warning letter to Pitts dated January 21 stating: "Time and again I have observed you loitering around the plant. Be advised, this will not be tolerated. This is warning number one." When asked why he issued a letter on that particular date, Raufeisen stated it was about that time he was spending more time at the plant and that Pitts "was spending far more time away from his work station than he had done on previous occasions." Pitts received no further warnings for loitering.

To support his contention that "threats to fellow coworkers" was a part of the basis for the discharge, Raufeisen cited only one threat, that to the draftsman, James Robinson. On February 1, Pitts had received a telephone call during his lunch break. The call lasted 7 minutes past the buzzer which signaled the end of the lunch break. Robinson told Raufeisen that Pitts had overstayed his lunch period. Raufeisen made a notation on Pitts' timecard which not only had the effect of docking Pitts for the time spent talking, but also cost Pitts his weekly bonus. This bonus is an incentive of 15 cents per hour which is awarded when an employee works a complete 40-hour week. On the following day, Friday, February 1, Pitts confronted Robinson. Pitts was asked on direct examination and testified:

Q. (By Mr. Loomis) What did you and Mr. Robinson say to each other the day you discussed it?

A. We got into an argument. I come back from lunch and I told him it was a lousy thing to do and I was going to kick his ass.

Q. Did he say anything to you?

A. He said I wasn't shit and I said lets go outside and the buzzer rang and I punched in.

On cross-examination, Pitts testified that Robinson had threatened him also. When asked specifically what that threat was, Pitts answered:

As I previously said, that I told him—I told him I was going to kick his ass and lets go outside and he told me I was a shit and no problem. He said he wanted to fight, but then he wouldn't go outside. I didn't physically touch him.

JUDGE EVANS: He said you weren't shit and there was no problem but he didn't ask you to go outside?

THE WITNESS: No, he didn't ask me to go outside.

When asked specifically if "going outside" did not mean going out and fight Pitts testified: "Even if he stepped outside, we could still talk." Pitts was then asked and testified:

Q. (By Mr. Curran) I presumed that during this confrontation you were pretty mad at him?

A. Not real—not killing mad, no.

To the extent Pitts attempted to deny that "stepping outside" meant anything other than fisticuffs, I discredit him. Moreover, it is clear that Pitts was in a rage (although possibly not "killing mad"), and did threaten Robinson. Specifically, it is clear that I should credit, and I do, the testimony of Robinson which he gave when called by Respondent that Pitts "[a]sked me to step outside so he could kick my ass up one side of the street and down the other."

The incident between Pitts and Robinson was reported to Raufeisen that afternoon. Raufeisen secured statements from Robinson and from Supervisor Wetley, who was present for part of the incident.[3] The statement, again

[3] Wetley did not testify and I will not consider and need not quote the content of his report submitted to Raufeisen since the basis thereof is unknown because it is not clear what part of the incident Wetley actually witnessed.

completed on an "Employee Warning Report" form, signed by Robinson, recites:

> Richards [sic] Pitts used foul language and threatened to "kick my ass up one side of the street and down the other," because "I made him lose his bonus."

Although he received statements from both Pitts and Wetley on February 1, Raufeisen did nothing to discipline Pitts. When asked on direct examination why Pitts was not terminated that day, Raufeisen stated that he had been receiving advice on proper and improper actions during the union campaign and:

> Under normal conditions, I would simply, the following Monday, have terminated Mr. Pitts. In this case, I held back. I wanted to very carefully evaluate in my mind the facts in the matter. I wanted to be sure we were not creating an incident resulting in what we are going through today. I wanted [no] shoot off the [hip] kind of thing, so I procrastinated, if you will.

The allegation of theft also depends on Robinson's testimony. Robinson testified that around the first of the year he witnessed Pitts taking a length of pipe and removing it surreptitiously to his automobile. Robinson testified further that he reported the incident to Supervisor Wetley and that later he was asked about the incident by Raufeisen. According to Robinson, Raufeisen asked Robinson if he wanted "to get involved and make a report." Robinson testified that he refused stating, "I would rather forget the whole thing because it was a $2 or $3 item and I was afraid for myself." When asked why he was afraid for himself, Robinson replied: "Because I had been threatened earlier and . . . I was afraid of retaliation because of it." Of course, the threat by Pitts to Robinson occurred at least a month after the alleged theft. It is clear, therefore, that Robinson was distorting his testimony in an effort to assist Respondent in this case even though, as he testified, he was to be laid off the day after the hearing. Pitts credibly denied taking any company property without permission. Specifically, he testified that once, at a time before the union activity began, he was given permission to remove a piece of pipe by supervisor Bezmek. Supervisor Bezmeck was not called by Respondent to refute this testimony.

Raufeisen testified that he did not say anything to Pitts because of Robinson's refusal to stand by his story. At any rate, there was no further investigation of the matter and nothing said to Pitts about it.

B. *Conclusions*

Here the actions of Respondent are extremely suspicious. Respondent has a system of progressive discipline of which Pitts was not given the benefit. The sole exception was the "first" warning for loitering issued by Raufeisen on January 16. But there was no probative evidence of any subsequent loitering. Therefore, to the extent Pitts' loitering on January 16 was a part of the decisional basis for the discharge, it was a case of "one-strike-and-you-are-out."

The alleged theft of property simply was not proved by Respondent.

Pitts' attendance may have been less than Respondent desired, but there was no contention that it was any worse than that of any other employee, and the existence of a problem had not even been mentioned to Pitts. Rather, Respondent appears to have been content with simply denying Pitts his attendance bonus and letting it go at that.

The confrontation with, and the threat to, Robinson was ignored for 10 days, even though Raufeisen had two written statements that it had occurred by the close of business on February 1. Thus, Pitts' misconduct was condoned by Respondent.

The posting of the obscene notices by Pitts was clearly just cause for discharge. While the General Counsel's witnesses credibly testified that the particular obscene word was bandied about the plant regularly, and had been seen on the restroom wall, there was, of course, no contention that the particular word, or any other obscenity, was ever posted before at the plant.

Therefore, had Respondent simply discharged Pitts for putting up the first notice, and argued before the Board that this was the only reason for the discharge, this case would present no serious question.

However, there are two problems: First, Raufeisen put a photocopy of the first notice back up on the machine. Second, Raufeisen advanced a multiplicity of other reasons to be shown as cumulative deficiencies in Pitts' personality and work history.

Of course, advancing a multiplicity of inadequate reasons for discharge has always been held by the Board and the courts as an indication that the real reason lies elsewhere; and, where the discharge is effectuated in a context of prior or concurrent unfair labor practices, the Board and the courts will find that the real reason is an intention to discriminate because of union activities.[4]

But here there is no evidence of unlawful motivation, and the timing of the discharge is related to no particular union activity which would raise an inference of unlawful motivation.[5]

Raufeisen's posting of the photocopy of the first obscene notice raises a hard question. Raufeisen acknowledged that Pitts was the only "Rick" in the plant, but testified that he put the copy on the machine because he was not sure it was Pitts who had placed the notice there and he thought this would be a good way to find out. This makes no sense. I doubt that there was any doubt, but if there had been Raufeisen could simply have asked Pitts about the matter. Therefore, Raufeisen's handling of the matter is inexplicable in any logical terms, but it still cannot be logically concluded that Raufeisen, by reposting the obscenity, demonstrated that he approved of (or condoned) Pitts' conduct.

Respondent is not on trial for the way it investigates misconduct which has nothing to do with protected ac-

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[4] See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).

[5] Cf. *Union Camp Corporation, Building Products Div.*, 194 NLRB 933 (1972).

tivities. Nor should a Board order be issued, in effect, because Respondent's defense is an exercise in lily-gilding.

The most that could be made of Respondent's defense, and its handlIng thereof, is that it is suspicious, as mentioned before. But, as stated by Administrative Law Judge Silberman, and adopted by the Board in *McMullen Corporation, d/b/a Briarwood Hilton*, 222 NLRB 986, 991 (1976):

> The employer's explanation for a discharge is a factor which is weighed in determining whether the action was unlawful. However, a feeble reason for the termination, alone, or together with evidence that the employer knew of the dischargee's union sympathies and was opposed to an ongoing organizational campaign, does not spell out an unlawful discharge. To find a violation of Section 8(a)(3) the evidence must permit a positive finding (which may be based on circumstantial evidence) that union activity was a contributing factor in the decision to discharge the employee. Suspicion that such was the case is not enough.

Moreover, since there is a complete absence of evidence of unlawful motivation, the *sine qua non* of 8(a)(3) cases,[6] the suspicion engendered cannot serve as a predicate for a conclusion that Respondent's real reason was the protected union activity of Pitts.

Accordingly, I find and conclude that Respondent has not violated Section 8(a)(1) or (3) of the Act by either its issuance of a warning notice to Pitts on January 21[7] or its discharge of Pitts on February 11.

[Recommended Order for dismissal omitted from publication.]

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[6] *Borin Packing Co., Inc.*, 208 NLRB 280 (1974).

[7] As well as a lack of animus which would support a finding of a violation in regard to that warning notice, the General Counsel also failed to prove that Pitts was not loitering at the time in question.